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IN THE UNITED STATES SUPREME COURT

VADIE COLLEEN PARISH, §
Appellant, §
- v. - §
CHARLES ROBERT PARISH, §
Appellee. §

CASE NO. 79-5694

JURISDICTIONAL STATEMENT

-- In Appeal from the Supreme Court of Alabama --

(SC 78-805)

621, City Federal Building
Birmingham, Alabama 35203
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A

OPINIONS BELOW

Opinions delivered below have yet to be officially reported.

Set forth as Exhibit:

"1" hereto is the Notice of Appeal to this Court, timely filed in the Court of Civil Appeals in the custody of which the record on appeal reposes;

"2" hereto is the Denial, by the Alabama Supreme Court, of Colleen's Petition for Writ of Certiorari to the Court of Civil Appeals;

"3" hereto is the Denial, by the Court of Civil Appeals, of Colleen's Application for Rehearing;

"4" hereto is the Order of the Court of Civil Appeals affirming the termination of Colleen's alimony pursuant to the statute in question and consequent refusal to increase her alimony;

"5" hereto is the Order of the trial court terminating Colleen's alimony pursuant to the statute in question and consequently refusing to increase her alimony;

"6" hereto is the original Decree granting alimony and child support (as amended).

No application for rehearing was filed in the Alabama Supreme Court, because "No application for rehearing shall be received in the Supreme Court if the petition for certiorari is denied." Rule 39(j), Alabama Rules of Appellate Procedure.

B

CIRCUMSTANCES ATTRACTING THE JURISDICTION OF THE UNITED STATES SUPREME COURT

1

Nature of Proceeding and Statute in Question

This began as a commonplace action to enforce Colleen's arrearage of alimony and to increase her award by reason of supersedent disability and increased medical expenses.

During its pendency at first instance was enrolled Act No. 596 of 1978, now codified as § 30-2-55, Code of Alabama, 1975:

> Any decree of divorce providing for periodic payments of alimony shall be modified by the court to provide for the termination of such alimony upon petition of a party to the decree and proof [i] that the spouse receiving such alimony has remarried or [ii] that such spouse is living openly or cohabiting with a member of the opposite sex.

Numerals have been inserted to designate the first and second limbs of the statute, respectively. It was pursuant to the second limb that Colleen's alimony was terminated, and her claim for increased alimony consequently denied.

In the proceedings below, the second limb received its first definitive construction, there having been "previously no reported appellate decision interpreting that part of the statute at issue" (Order of the Court of Appeals, Exhibit "4", page three). As a result of the construction which has now been placed on the statute, Colleen lost her alimony and right to increased alimony.

That construction is violative of guaranties of constitutional certainty and of the equal protection of the laws under the United States Constitution.

Determinations below and their Dates

Colleen was deprived of alimony at first instance 29 November 1978 (Exhibit "5" hereto). This application of the statute in question was duly and persistently appealed to the exhaustion of the appellate process within Alabama. The Alabama

Supreme Court denied Colleen's Petition for Writ of Certiorari 14 September 1979. Intermediate determinations and their dates are recited in the Notice of Appeal to this Court, Exhibit "1" hereto.

That Notice of Appeal was timely filed in the Court of Civil Appeals 12 October 1979, this being the court in the custody of which the record on appeal reposes.

Cases and Statutes Sustaining the Jurisdiction

This Court has cognizance of the instant appeal by force of 28 U.S.C. 1257, and provisions of the United States Constitution guaranteeing to American citizens the equal protection of the laws, and that the laws to which they are subject shall meet the constitutional standard of certainty.

Because of the deprivation to which she has been personally subjected, Colleen has standing to bring this appeal. Jenkins v. McKeithen, 395 U.S. 411 (1969).

The United States Supreme Court is bound to accept the interpretation of State law by the highest court of a State. Hortonville Joint School District No. 1 v. Hortonville Educational Ass'n, 426 U.S. 482 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972);

Groppi v. Wisconsin, 400 U.S .505 (1971).

A presumption of constitutionality attaches to all enactments, so that until forced to a contrary conclusion by definitive appellate construction, the United States Supreme Court will presume that a State statute will be construed by State courts in accordance with constitutional requirements. Flemming v. Nestor, 363 U.S. 603 (1960); Local Union v. Missouri, 361 U.S. 363 (1960); U.S. v. Vuitch, 402 U.S. 62 (1971); Harris County Comm'ers Court v. Moore, 420 U.S. 77 (1975); Alabama State Fed. of Labor v. McAdory, 325 U.S. 463 (1945).

Constitutional challenge is timely made, at whatever stage in the appellate process, when for the first time a State statute is unconstitutionally applied. Missouri v. Gehner, 281 U.S. 313, 320 (1930); Curtis Pub. Co. v. Butts, 388 U.S. 130, 143, 145; Brinkerhoff-Farris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930); Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 367 (1932). See, too: Saunders v. Shaw, 244 U.S. 317 (1917); Chambers v. Mississpii, 410 U.S. 284 (1973).

Constitutional challenge is timely made where throughout the proceedings below an appellant has insisted that as construed to apply to the circumstances of his case, the State statute is unconstitutional: Cohen v. California, 403 U.S. 380, 385 (1927); Terminiello v. City of Chicago, 337 U.S. 1, 3 (1949).

A statute is repugnant to the United States Constitution where it is so vague that men of ordinary intelligence must necessarily guess at its meaning and differ as to its application. Conally v. General Construction Co., 269 U.S. 385 (1926); Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936); Neblett v. Carpenter, 305 U.S. 297 (1938); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Grayned v. City of Rockford, 408 U.S. 104, 108-9 (1972); Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961).

A statute is repugnant to the United States Constitution where it imposes upon the citizenry a classification which is arbitrary, resting on no ground of difference having a reasonable relation to the subject-matter of the legislation. Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971); Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. U. S. Dept. of Agriculture, 406 U.S. 164 (1972); U. S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973); Rinaldi v. Yeager, 384 U.S. 305 (1966); Baxstrom v. Herold, 383 U.S. 107 (1966); Carrington v. Rash, 380 U.S. 89 (1965).

C

QUESTIONS PRESENTED ON APPEAL

Whether the statute in question, as it has now been definitively construed, is void under the United States Constitution because unconstitutionally vague.

Whether the statute in question, as it has now been definitively construed, is unconstitutional as imposing an irrational classification or classifications.

Whether, in light of the patent and glaring unconstitutionality of the statute as it has now been definitively construed, it remains open to Colleen to make good her claim to increased alimony.

D

STATEMENT OF THE CASE

Colleen appeals to this Court from the deprivation of her alimony pursuant to the recently enrolled Act No. 596 of 1978, now codified as § 30-2-55, Code of Alabama, 1975:

> Any decree of divorce providing for periodic payments of alimony shall be modified by the court to provide for the termination of such alimony upon petition of a party to the decree and proof [i] that

> the spouse receiving such alimony has remarried or [ii] that such spouse is living openly or cohabiting with a member of the opposite sex.

The numerals in brackets are added to designate the first and second limbs of the statute, respectively.

Colleen insists that the statute as it has now been definitively construed is unconstitutionally vague (thus violating the first essential of due process) and imposes an irrational classification or classifications (thus denying her the equal protection of the laws).

It should be noted that alimony was sought to be terminated, too, by means of a contention that Colleen had entered into a common-law marriage, a relationship recognized in Alabama. Kelly v. Kelly, 247 Ala. 316, 24 So.2d 265 (1945). But the trial court refused to accept this argument, terminating Colleen's alimony with a verbatim recitation of the second limb of the statute.

> The Court finds that the Defendant [Colleen] has been and is living openly or cohabiting with a member of the opposite sex. The Decree ... is hereby modified and amended so as to delete the requirement that the Plaintiff pay to the Defendant periodic alimony.

Exhibit "5" hereto. It is this determination, that the second

limb may be attracted in circumstances other than of common-law marriage, which was affirmed by the Court of Civil Appeals.

> [Colleen's] basic contention is that ... we must construe the phrase "living openly or cohabiting with a member of the opposite sex" to require a showing that the offending spouse [sic] has entered into a common-law matrimonial relationship. We do not agree with the wife's position.

Exhibit "4", page three, second paragraph.*

The significance of the rejection of the contention that Colleen had entered into a common-law marriage is that, on the construction of the statute offered by Colleen, that rejection made impossible the termination of her alimony pursuant to § 30-2-55. This is because Colleen construed the first and second limbs as applying in circumstances of ceremonial and of common-law marriage, respectively. Since, then, Colleen had remarried neither ceremonially nor at common law, the statute would be inapplicable.

However, as has been seen, this construction was rejected by the Court of Civil Appeals. In light of the Alabama Supreme Court's denial of Colleen's Petition for Writ of Certiorari, it can only be concluded that that court adopted the view of the

*No cross-appeal was taken from the refusal of the trial court to accept the contention of a common-law marriage, which is therefore final.

Court of Civil Appeals that the second limb is attracted in circumstances: of physical proximity ("lived in the residence of"), and/or of "sex" ("shared the same bed"), and/or of monetary and ("or"?) in-kind "contributions" of an indeterminate character. See Exhibit "4", page four, second paragraph.

It is the constitutionality of this construction, if such it may be called, that is challenged in the instant appeal. The construction was of course not definitive until it received the imprimatur of the Alabama Supreme Court with the denial by that court of Colleen's Petition for Writ of Certiorari (Exhibit "2" hereof). Hortonville Joint School District No. 1 v. Hortonville Educational Ass'n, 426 U.S. 482 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972); Groppi v. Wisconsin, 400 U.S. 505 (1971). Until that moment, it was to be presumed that the Alabama Supreme Court would construe the statute in accordance with constitutional requirements. Flemming v. Nestor, 363 U.S. 603 (1960); Local Union v. Missouri, 361 U.S. 363 (1960); U.S. v. Vuitch, 402 U.S. 62 (1971); Harris County Comm'ers Court v. Moore, 420 U.S. 77 (1975); Alabama State Fed. of Labor v. McAdory, 325 U.S. 463 (1945).

Thus, until the highest court of the State construed § 30-2-55 in a way which brings it squarely into conflict with the United States Constitution, the newly enrolled Act could not be under attack as being unconstitutional. Rather, the exercise

was one of statutory construction involving, in part, the "duty" of courts

> to construe a statute, whenever reasonably possible, so that it may be constitutional rather than unconstitutional. [Cit. omit.] And the Alabama courts adhere to that rule. [Cit. omit.] State courts ... may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them.

Alabama State Fed. of Labor v. McAdory, 325 U.S. 463, 470 (1945).

Not until the denial by the Alabama Supreme Court of Colleen's Petition for Writ of Certiorari were the stigmata of constitutional repugnance ineffaceably fixed upon § 30-2-55.

* *
*

The repugnance to the United States Constitution of this construction and application of § 30-2-55 was consistently brought to the attention of the courts below, even before it became definitive with the denial of Colleen's Petition for Writ of Certiorari.

As the third paragraph of her Petition for Writ of Certiorari, Colleen argued as follows.

> The decision hereby contested amounts to an initial holding that taken in the sense which has been accepted below, § 30-2-55 is constitutionally valid. Petitioner urgently represents that a definitive appellate construction of § 30-2-55 along the lines accepted below will render that enactment unconstitutional as imposing an irrational classification, as well as unconstitutionally vague.

Exhibit "A" hereto.

The Brief in support of the Petition for Writ of Certiorari made these remarks in connection with the disregard by the Court of Civil Appeals "of Colleen's position as it derives from the United States Constitution."

> The Opinion hereby contested sets standards of constitutional certainty and of the equal protection of the laws utterly at naught.
>
> In demonstrating that if they are at all to avail themselves of their rights under the United States Constitution, American citizens living in Alabama will have to approach the federal bench -- all the while disregarding the binding appellate authority of the United States Supreme Court -- the Court of Civil Appeals fosters a distinction between the rights of American citizens living in Alabama and the rights of American citizens living elsewhere than in this State.

Exhibit "D" hereto, pages seventy to seventy-one.

It will be seen that although the Alabama courts have indeed chosen to "disregard the binding appellate authority of the United States Supreme Court" once again, the constitutional position

was argued in extenso, and with the citation of a perfect plethora of federal authority -- not only in the Brief supporting the Petition for Writ of Certiorari (Exhibit "D" hereto, pages 9-10, 15-16, 18-25, 29-33, 57-60, 70-71), but also to the Court of Civil Appeals (Exhibit "F" hereto, pages 6, 11, 13-17, 21-24).

Both Alabama appellate courts were put on notice that this Court could later have occasion to consider the constitutionality of the statute as it might eventually be definitively construed. Exhibit "D" hereto, pages 9-10; Exhibit "F" hereto, page 6. But neither court had the least reference to federal legal standards in its construction of § 30-2-55.

This was inescapably brought to the attention of the Court of Civil Appeals, as well. "[Colleen] demonstrated ... that it is the duty of courts to construe a statute so as to render it harmonious with the fundamental law of theland. This Court, however ... made no attempt ... to construe the subject enactment as harmonious ... with the American Constitution." Application for Rehearing, Exhibit "B" hereto, pages 5-6.

> [T]he Court made no effort whatever to ascertain whether the [construction] thus reached renders the enactment unconstitutional ... .

> Nor is this all. For the Court ignored the demonstration that the position reached is indeed unconstitutional, as well as the binding federal authority upon which that demonstration is based.

Application for Rehearing, Exhibit "B" hereto, pages 7-8.

For purposes of this Jurisdictional Statement, the reader's particular attention is respectfully directed to the following passage, with which the Application for Rehearing concludes.

> This Court disregards the binding authority of the American Supreme Court as repeatedly cited to it. But surely the Court will not expect the Supreme Court to ignore its own decisions? It is therefore apparent that in disregarding those decisions, this Court is presuming upon the statistical improbability of [Colleen's] being able to put her case to the American Supreme Court in order to gain the benefit of the law as it is applied by that court.
>
> In demonstrating that if they are at all to avail themselves of their federal Constitutional rights, American citizens in Alabama will have to approach the federal bench -- all the while disregarding the binding authority of that bench -- the courts of this State foster a distinction between the rights of American citizens living in Alabama and the rights of Americans living elsewhere than in this State.

Exhibit "B" hereof, pages 11-12. This is of course similar to the passage already quoted which concludes the Brief in Support of Colleen's Petition for Writ of Certiorari. Exhibit "D" hereto, pages 70-71.

As is so clearly made to appear in the Application for Rehearing, as amplified in the Petition for Writ of Certiorari, the constitutional issue was even raised prior to the initial determination at first instance in the form of a Trial Brief! Exhibit "A" hereto, pages 3-5.

"Whenever the power to enact a statute as it is by its terms or is made to read by construction is fairly open to denial and is denied, the validity of such statute is drawn in question." Baltimore & O.R. Co. v. Hopkins, 130 U.S. 210 (1889). And see the cases cited on page 5 hereof, the second and third paragraphs. Like Cohen himself, "Throughout the proceedings below, [Colleen] consistently claimed that, as construed to apply to the facts of the case" the statute was constitutionally repugnant. Cohen v. California, 403 U.S. 15, 17-18 (1971). Of Colleen this Court can say, as it said of an appellant in a previous case, "We do not see what more [she] could have done." Saunders v. Shaw, 244 U.S. 317 (1917).

Because the necessary effect of the judgments below has been to deny the claim that the statute as it has now been definitively construed is repugnant to the United States Constitution, Colleen Parish is properly before the Court. 28 U.S.C. 1257; People v. Zimmerman, 278 U.S. 63, 67 (1928); Crowell v. Randall, 10 Pet. 368, 390 (1836).

E

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

Of the substantiality of the federal questions there can be no doubt. The statute as it has now been definitively construed is repugnant to the United States Constitution in imposing an irrational classification or classifications, and because it is unconstitutionally vague.

The constitutional infirmity of § 30-2-55 arises from the failure of the courts below to confine its operation to circumstances of ceremonial and of common-law marriage.

1

Irrationality of Classification

A statute is repugnant to the United States Constitution where it imposes upon the citizenry a classification which is arbitrary, resting on no ground of difference having a reasonable relation to the subject-matter of the legislation. Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971); Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); U. S. Dept. of Agriculture v. Morena, 413 U.S. 528 (1973); Rinaldi v. Yeager, 384 U.S. 305

(1966); Baxstrom v. Herold, 383 U.S. 107 (1966); Carrington v. Rash, 380 U.S. 89 (1965).

The subject-matter of § 30-2-55 is alimony.

The purpose of alimony is to provide a source of support upon which a former spouse to whom alimony has been awarded is legally entitled to draw. See: Davis v. Davis, 279 Ala. 643, 644, 189 So.2d 158, 160 (1966); Haynes v. Haynes, 360 So.2d 1016, 1018 (Ala.App., 1978); Ex parte Parker, 334 So.2d 911, 912 (Ala.App., 1976).

The subject enactment, when attracted, mandates the termination of alimony, divesting courts of equity of all discretion in the matter ("shall be modified to provide for the termination of such alimony"). And alimony, once terminated, can never be restored.*

The constitutional requirement that the statute have a reasonable relation to its subject-matter, when applied

*A court has no jurisdiction to restore alimony when once it has been terminated. 24 Am.Jur.2d "Divorce and Separation" § 651. Section 30-2-51, Code of Alabama, 1975 provides for awarding alimony only "upon granting" a divorce, while under § 30-2-52, also, an award of alimony is an incident of the divorce itself. Owens v. Owens, 281 Ala. 239, 201 So.2d 396 (1967); Sanford v. Sanford, 271 Ala. 508, 125 So.2d 1 (1960). Absent special statutory provision, the general rule prevails that courts have no jurisdiction to award alimony where alimony is not provided for in the decree sought to be modified. See 83 A.L.R. 1248.

to the purpose for which that subject-matter, alimony, exists, defines the circumstances in which the statute can constitutionally be attracted.

Thus, the mandatory and irrevocable termination of alimony is justified only where the spouse receiving alimony has attained an alternative source of support upon which he is legally entitled to draw. Ceremonial and common-law marriage, alone, provide such an alternative source of support in the person of the new spouse. Only remarriage, either ceremonially or at common law, supersedes the purpose of the alimony award and so justifies its mandatory and irrevocable termination.

It will be recalled, however, that the construction that the first and second limbs of the statute are attracted in circumstances of ceremonial and of common-law marriage, respectively, was rejected. The courts below refused to confine the operation of the second limb to circumstances of common-law marriage.

Rather, the courts found that the legislature "intended to strike a balance between the occasional brief sojourn and the common-law marriage" (Exhibit "4" hereto, page three, fourth paragraph). But what, pray, <u>is</u> that "balance"? What, for that matter, is "the occasional brief sojourn" referenced by the court?

No answer is provided, likely enough because none exists. As though to illustrate this fact, the courts below would appear to have considered that the second limb is attracted in circumstances: of physical proximity ("lived in the residence of"), and/or of "sex" ("shared the same bed"), and/or of monetary and ("or"?) in-kind "contributions" of indeterminate character. See Exhibit "4", page four, second paragraph.

Now, what do physical proximity, "sex", and "contributions" have in common? Answer: that not one of them has anything to do with the purpose of alimony. To subject a person to the mandatory and irrevocable termination of his means of support in any of the circumstances (or any combination thereof) adduced by the courts below is every bit as reasonable as to deprive him of alimony because he has bought a Buick, visited the Lincoln Memorial, or turned forty-two years of age. In a word, the classification imposed is irrational, and irrational in a grotesque degree.

It is pertinent in this connection to observe that on the construction arrived at below, one could rob a bank, kidnap a child, or murder one's own father and still not be deprived of alimony. But to be in physical proximity to a member of the opposite sex, engage in "sex", and/or receive "contributions" results in the termination of alimony, mandatorily and irrevocably. It is obvious that the classification

imposed fulfills no legitimate (or even conceivable) State purpose. Why, prostitution itself -- which doubtless involves physical proximity to a member of the opposite sex, "sex", and monetary and/or in-kind "contributions" -- is not a crime in Alabama.

There is a second and independent ground of irrationality. It has been seen that to classify citizens receiving alimony into two groups -- the proximity cum "sex" cum "contributions" group(s) and the others, the statute affecting only the former group(s) -- is irrational and denies members of the former group(s) the equal protection of the laws. No less irrational, however, is a second classification, this one of divorced citizens as a whole. This second classification divides divorced citizens into two groups: those receiving alimony and those either providing or for some other reason not receiving alimony, the statute again affecting only the former group.

To what purpose this second classification? For what conceivable reason should persons receiving alimony be visited with the deprivation of their means of support in circumstances in which the rest of the population is left entirely undisturbed in the enjoyment of its legal entitlement? Nothing could better illustrate that there is no legitimate or even conceivable State purpose to be served in discouraging proximity and/or "sex" and/or "contributions" than that the citizens affected form so minuscule a portion of the whole. Nor could it be any clearer than that if this were the purpose

of the State, the means chosen for its effectuation have not the remotest relation to that end.

As seen in portion "D" hereof, the constitutional issue was repeatedly raised below: in the Petition for Writ of Certiorari (Exhibit "A", paragraph three), in the Brief supporting the said Petition (Exhibit "D", pages 9-10, 15-16, 29-33, 57-60, 70-71), in the Application for Rehearing (Exhibit "B", pages 5-6, 7, 11-12), in the principal Brief on Appeal (Exhibit "F", pages 6, 11, 21-24), and in the Trief Brief (see Exhibit "A", pages 3-5).

2

Unconstitutional Vagueness

A statute written in terms so vague that men of ordinary intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. Connally v. General Construction Co., 269 U.S. 385 (1926); Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936); Neblett v. Carpenter, 305 U.S. 297 (1938); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

As has been well said, "Vague laws offend several important values."

> First ... we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. ... Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Grayned v. City of Rockford, 408 U.S. 104, 108-9 (1972). The objection to such laws is that in truth they are so vague and indefinite as to afford no standard or rule at all. Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961). They afford citizens no guidance in planning their lives. They are prone to arbitrary application and inconsistent adjudication. They are not laws at all, but incitements to tyranny.

Such a law is § 30-2-55 as definitively construed. Common-law marriage, as classically expounded in Reynolds v. Scott, 257 Ala. 670, 672, 60 So.2d 690, 691 (1952), is a well understood, definite concept of identifiable content. This concept was rejected in the construction of the second limb of § 30-2-55. The holding below is that the second limb is attracted in circumstances other than of common-law marriage.

The question is therefore: in what circumstances? Why, in circumstances: of physical proximity to a member of the opposite sex ("lived in the residence of"), and/or of "sex" ("shared the same bed"), and/or of monetary and ("or"?) in-kind "contributions" of indeterminate character. See Exhibit "4", page four, second paragraph.

Here, surely, is Milton's "darkness visible". If physical proximity is to be a factor in triggering the operation of the statute, then with what frequency need persons associate so as to call down upon their heads its malediction? as once, twice, or ten times a week, month, or year. With what duration? And how near! Is the separation of one wall sufficient, or are two or three necessary? Must the building concerned be a house, motel, or hostel? Of what size? Are students resident in co-ed dormitories subject to the operation of the statute for this reason?

The first problem with "proximity" as an element in attracting the statute is that it is intrinsically meaningless. Is Alabama proximate the District of Columbia? Is the earth proximate the sun? The only answer is, that all depends on what we mean by "proximate". But this is no answer at all because what we mean by "proximate" is precisely the question with which we begin.

The second problem with "proximity" is that it leaves innumerable questions unanswered. What, for instance, of the purpose of the proximity? Does it make a difference if it is occasioned by vocation, or recreation, or necessity? To some combination thereof and, if so, to what relative extent?

Much the same difficulty attends "sex" as a

catalyst which renders the statute operative, but with the further complication that it is entirely open as to the form such "sexual" activity must take.

And when we place all these questions regarding physical proximity side-by-side with all these questions regarding sexual activity, the result is confusion exponentially confounded. By what relationship is the statute attracted of degree, incidence, and frequency of physical proximity to form, indicence, and frequency of sexual activity!

In this connection it should be remarked that divorce ends the duty of marital fidelity: O'Dell v. O'Dell, 57 Ala.App. 185, 326 So.2d 747, 750 (1976). The very existence of alimony, however, proclaims that it does not end the duty of support. It is, therefore, fundamentally absurd that sexual intercourse following divorce should be made to end the duty of support.

The "contributions" element of the construction reached is perhaps the most self-evidently vague of them all. What form of "contribution", for what purpose, and how (if at all) repayable? Must the "contributions" be from the same person to whom the spouse receiving alimony is (or was?) physically proximate? (Must, for that matter, the "sexual" activity be with such person?)

There is no need to belabor the constitutional point, which was asserted again and again below: in the Petition for Writ of Certiorari (Exhibit "A", paragraph three), in the Brief supporting the said Petition (Exhibit "D", pages 9-10, 18-25, 59-60, 70-71), in the Application for Rehearing (Exhibit "B", pages 5-6, 8-9, 11-12), in the principal Brief on Appeal (Exhibit "F", pages 6, 13-17), and in the Trial Brief (see Exhibit "A", pages 3-5).

3

Widespread Incidence of the Act's Application

The federal questions would be substantial if the statute concerned no one but Colleen. Needless to say, this is not the case. The divorce rate in Alabama is among the highest in the nation. The following is taken from Vital Statistics of the United States, 1975, Vol. 3 (Dept. of H.E.W., 1979).

-- Alabama Divorce and Annulment Rate --

1970	15,109		4.4 per 1,000 pop.
1971	16,905		4.9 per 1,000 pop.
1972	18,958		5.4 per 1,ooo pop.
1973	20,399		5.8 per 1,000 pop.
1974	21,123		5.9 per 1,000 pop.
1975	23,001		6.4 per 1,000 pop.

Thus in the six-year period from 1970 through 1975 there occurred some 115,000 divorces in Alabama. The statistical picture reveals a steadily mounting increase of divorce both in absolute figures and as a percentage of the total population.

There were divorces before 1970, and there have been divorces since. With Colleen, this multitude are hostage to a statute which grossly offends the United States Constitution.

They are entitled to their rights as American citizens, but as the decisions below so amply attest, they will not enjoy those rights without the intervention of this Court.

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CONCLUSION

In light of the foregoing and 28 U.S.C. 1257, it is respectfully concluded that Colleen Parish is absolutely entitled to approach this honorable Court for the vindication of the rights of herself and of numerous others under the United States Constitution.